

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH, COURT – III**

C.P.(IB)-641(MB)/C-III/2022

(Under Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rule 2016.)

In the matter of

Intec Capital Limited

Having Registered Office at: 708, Manjusha Building, 57, Nehru Palace, New Delhi, South Delhi- 110019.

.....Financial Creditor/ Applicant

Vs

M/s. Shivani Felxipack Limited

Having Registered Office at: 26, Piyu Shantiban, Nemi Nath Nagar, Sangli, Maharashtra-416416.

.....Corporate Debtor/Respondent

Order Delivered on 28.11.2023

CORAM:

**SHRI CHARANJEET SINGH GULATI
HON'BLE MEMBER (T)**

**SMT LAKSHMI GURUNG
HON'BLE MEMBER (J)**

Appearances:

For the Financial Creditor: Adv. Vidit Divya Kamat

For the Corporate Debtor: Adv. Rohit Gupta i/b Vilas Bane

ORDER

Per: - Smt. Lakshmi Gurung (Judicial Member).

1. The Present **Company Petition (IB)-641(MB)/2023** has been filed under section 7 of Insolvency and Bankruptcy Code, 2016 (“IBC, 2016”) by **Intec Capital Limited, (“Financial Creditor/Petitioner”)** for initiating Corporate Insolvency Resolution Process (“CIRP”) against **M/s Shivani Flexipack Limited (“Corporate Debtor/Respondent”)** for default in repayment of loan.

Background Facts

2. The Corporate Debtor approached the Financial Creditor to avail loan facility for purchase of machinery. Accordingly, the Financial Creditor sanctioned the loan facility vide Sanction Letter dated 18.11.2011 to the tune of Rs. 1,66,40,134/- (Rupees One Crore Sixty-Six Lakhs Forty Thousand One Hundred and Thirty-Four only), pursuant to which Loan Agreement was executed on 18.01.2012 between the Financial Creditor and Corporate Debtor. As per the said loan agreement No. 011/496 dated 18.01.2012, following security was offered: -
 - a. Collateral Money of Rs. 49,92,040/-;

- b. Personal Guarantee of Mr. Shankar Namdev Kashid and
 - c. First and exclusive charge, by way of hypothecation, Lamination Machine - 1000 MM (Lami Plus 2000 series), three (3) in number for total amount of Rs. 1,66,40,134/- vide Proforma Invoice No. 048/11-12 dated 30.12.2011.
- 3. As per the said Loan Agreement, the loan amount was repayable in 60 monthly instalments of Rs. 3,87,715/- (Rupees Three Lakhs Eighty-Seven Thousand Seven Hundred and Fifteen Only) each. The Loan carried interest @7.96% P.A.
- 4. On execution of the said Loan Agreement dated 18.01.2012, along with other transitional documents like Letter of Continuity, Consideration Receipt, Undertaking, Deed of Guarantee, Agreement creating charge etc. the loan amount was disbursed through cheques to (i) Corporate Debtor on 20.01.2012 for Rs. 45,00,110/- and to (ii) the machine vendor **Polygraph Printing Technologies Ltd. (Manufacturer)** on 02.02.2012 for Rs. 1,21,40,024/-.
- 5. In addition to the ***Loan Agreement with transitional documents*** dated 18.01.2012, the Financial Creditor has also filed-
 - a. Copy of Form-8 filed with Registrar of Companies to create charge along with certificate of registration of mortgage under section 132 of the Companies Act, 1956 dated 03.02.2012;

- b. Copy of bank account statements of the Financial Creditor showing loan disbursements to the Corporate Debtor and to machine vendor;
 - c. Copy of Repayment Schedule;
 - d. Copy of Statement of Dues depicting financial debt due & payable by Corporate Debtor as on 30.09.2021 and
 - e. Record of default available with Information Utility.
6. The Corporate Debtor made multiple defaults in the repayment of the loan amount as per the Loan Agreement. Therefore, the Financial Creditor sent a Loan Recall cum Arbitration Notice dated 28.11.2012. The Arbitration Award has been passed on **21.02.2018** in favour of the Petitioner holding that the Corporate Debtor has defaulted in making the payment of the loan taken from the Financial Creditor.
7. In view of the above background the Financial Creditor has filed the present petition stating that the **date of default is 21.02.2018 (date of the arbitration award)** and the amount claimed is Rs.2,93,48,007/- (Rupees Two Crores Ninety-Three Lakhs Forty-Eight Thousand Seven Rupees) as on 30.09.2021. Date of filing the petition is 13.05.2022. Considering the exclusion period provided by the Hon'ble Supreme Court in *Suo Motu Writ Petition (Civil) No. 3 of 2020*, the present petition is within limitation.

Reply by the Corporate Debtor/Respondent

8. The main defence taken by Respondent is that the Financial Creditor disregarded the instructions given by the Creditor vide its letter dated **18.11.2011** and instead of releasing the loan amount to the Manufacturer in tranches commensurate with the progress in manufacturing the machines, released the entire amount to the Manufacturer without monitoring the progress of machines.

9. The Respondent submitted that due to failure by the Manufacturer to deliver the machine on time, it suffered losses. Subsequently, the Hon'ble Supreme Court banned gutkha/pan masala products in all states in the month of July 2012, therefore the Respondent requested the Manufacturer to cancel the said order for three machines and to adjust the amount by providing different machine with changes in technical specifications.

10. The Respondent claims to have suffered losses to the tune of Rs. 25 lakhs per month from October, 2012. Hence it stopped to honour the cheques presented by the Financial Creditor with effect from December 2012. The Financial Creditor therefore instructed the Manufacturer vide email dated 27.01.2013 not to dispatch the machine to the Corporate Debtor without its permission. Respondent cancelled the order vide letter dated 15.05.2013 and requested the Manufacturer to refund the full payment of Rs. 1.97 crores with interest.

11. The Respondent further submitted that the Manufacturer has fraudulently sold the said machines to one Mr. V.N. Rao. Therefore, the Respondent had filed a complaint with the Samtanagar Police Station. When no cognizance was taken by Police, then it filed a private complaint in the Court of Metropolitan Magistrate, Borivali, Mumbai for registration of FIR and the Magistrate has directed inquiry under section 202 of CrPC.
12. The Respondent further submitted that it has filed a commercial suit No. 61/2015 before Hon'ble Bombay High Court against the Manufacturer as Defendant No. 1 and the Financial Creditor as Defendant No.2 and vide order dated 31.01.2018, the Hon'ble High Court has granted an interim order restraining the Defendants from depositing, presenting, honouring or in any manner dealing with post-dated cheques of the plaintiff (the Corporate Debtor).
13. Under the circumstances, the Respondent in the end, submits that it is the Financial Creditor which is liable to pay back the collateral security amount of Rs. 49,92,040/-, the instalments amount of Rs. 21,74,517/-, damages, interest etc. to the Corporate Debtor and the total claim of the Corporate Debtor is Rs. 2,94,60,935/-.

Findings

14. Heard the Ld. Counsel for the Parties and carefully examined the Annexure attached to the Petition and the Reply.

15. The Petitioner has claimed the present petition on the basis of the Arbitration award passed by the Sole Arbitrator on 21.02.2018 in the matter of M/s Intec Capital Ltd. Vs. (1) Shivani Flexipack Ltd., (2) Shankar Kashid, and (3) Markand Pandit. Respondents 2 and 3 are the two Guarantors. The operative part of the arbitration award is reproduced below: -

“55. That the respondents have not filed the pleadings of the suit filed by them against M/s Polygraph printing technologies ltd and nor any decision of the said case has been placed on record, hence the same cannot be considered in the present proceedings and even the M/s Polygraph printing technologies ltd is not party to the present proceedings.

56. **The respondents as have defaulted in making the payment of the loan amount taken by them,**
*Hence are liable to make the payment to the claimant of the amount of Rs. 1,92,87,184/- (Rupees One Crore Ninety Two Lacs Eighty Seven Thousand one Hundred Eighty Four only) as claimed by the claimant in terms of the agreed terms and conditions of the Loan Agreement bearing No. 011/496 dated 18.10.2012. (**sick** should have been 18.01.2012).*

(Emphasis Provided)

57. *The Respondent No. 1 as a principal borrower and respondent no. 2 to 3 as guarantors, in terms of the*

agreement entered into with the Claimant are jointly and severally liable to pay amount to the Claimant.

58. That as the respondents had deposited the amount of collateral security and as per clause 34 of the loan agreement the amount of Rs. 49,92,040/- without interest is being adjusted from the total amount of Rs. 1,92,87,184/-. The net amount payable by the respondents if Rs. 1,42,95,144/- (19287184 - 4992040).

60. I pass an award Rs. 1,42,95,144/- (Rs. One Crore forty two Lakhs ninety five Thousand One Hundred and forty Four) in favour of the claimant and against the respondents 1 to 3 jointly and severally along with interest @ 12% simple on the said amount w.e.f. 4-1-2013 from the date of invocation of Arbitration till the realisation of the amount.

61. Besides the above said award claimant is also entitled for cost of litigation a sum of Rs. 25,000/- and cost of stamp paper as Rs. 14,200/- Total cost as Rs.39,200/-. In case the cost not paid within 30 days of the award the further interest on the cost amount shall be paid @ 12% per annum simple from the date of award till its realization. The respondents shall pay the above said awarded amounts jointly and severally to the claimant.

16. It is a settled law that the insolvency proceedings can be initiated on the basis of arbitral award and three years limitation starts from the date of arbitral award. We are supported by the Judgement of ***Dena Bank vs. C. Shivakumar Reddy and Anr. Civil Appeal No. 1650 of 2020*** dated 04.08.2021.
17. In the Reply by the Respondent, the factum of sanction of loan amount, execution of the loan agreement with other transitional documents, disbursement of loan amount and registration of charge with Registrar of Companies under Companies Act, 1956 is not denied.
18. The main issue raised by Respondent is that the Petitioner disregarded its instructions given vide letter dated 18.11.2011 and violated the terms and conditions of the loan agreement and is therefore not entitled to initiate insolvency proceedings. We notice that the same issue was also raised before the Ld. Arbitral Tribunal. The same has been dealt with by the Ld. Arbitrator stating the letter dated 18.11.2011 filed by respondent has not been proved to be dispatched to the claimant and no postal receipt has been placed on record. He further goes on to record that payment instructions for disbursement of loan agreement no. 011/496 dated 18.01.2012, which forms integral part of the loan agreement, has been executed after the alleged letter dated 18.11.2011. Thereafter, considering all the evidences and the cross examination, the Ld. Arbitrator concluded that *“the defense sought to be raised in the cross examination and arguments is nothing but an*

afterthought. Hence the contentions of the respondent cannot be believed that there are any violation of the terms and conditions of the loan agreement.”

19. Thus the Ld. Arbitrator has already given findings on the issue raised by the Respondent and the award dated 21.02.2018 has already attained finality as no pending appeal under section 34 of the Arbitration and Conciliation Act has been brought to our notice.
20. As regard to the commercial suit pending before the Bombay High Court filed by the Respondent, against the Manufacturer and the Petitioner herein, suffice to say that, on going through the record placed before us, we find that the primarily dispute is between the Respondent and the Manufacturer relating to timely supply of the machine, cancellation of order, adjustment of the amount already paid for earlier order with purchase order for the new machine or to refund of the entire amount. In fact, the respondent is seeking direction to the Manufacturer to deposit the entire amount of Rs. 1,66,40,134/-, meaning thereby that there is no dispute about disbursement of the loan amount to the Manufacturer on behalf of the Respondent.
21. The dispute, between the Corporate Debtor and the Manufacturer to whom the loan amount was disbursed on the instructions of the Corporate Debtor, cannot be a ground to scuttle the proceedings under section 7 of the Code as long as debt and default is proved. If the Respondent has not received

the machines for which payment was made to the Machine Manufacturer then the remedy against the Manufacturer lies elsewhere and not before the Adjudicating Authority under the Insolvency and Bankruptcy Code, 2016. Under the Code, the Adjudicating Authority has to merely examine whether there is 'debt' and 'default'.

22. We are supported by the judgement of the Hon'ble Supreme Court in the ***Innoventive Industries Limited vs. ICICI Bank and Another (2018)1 SCC 407***, which clearly held that-

“The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days receipt of a notice from the adjudicating authority.

*30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, **the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred.** It is of no matter that the debt is disputed so long as the debt is “due” i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise.”*

(Emphasis Provided)

23. In view of the aforementioned judgement it is clear that the Adjudicating Authority only has to determine whether the

“debt” (which may be disputed) was due and remained unpaid. If the adjudicating authority is of the opinion that a “default” has occurred, it has to admit the application. In the present case, apart from the loan agreement, charge registration certificate, arbitration award, the Financial Creditor has also filed the Record of default certificate issued by NeSL dated 01.11.2021.

24. We are of the considered view that the Financial Creditor has proved existence of debt and default. Therefore, we hereby admit this company petition and also looking at the consent given by the Insolvency Professional, we hereby appoint **Mr. Madan B Vaishnawa** as an IRP, with a direction to the Financial Creditor to pay remuneration to the IRP and his expenses until the constitution of CoC.

25. Accordingly, this Company Petition is **admitted** with the following directions:

- i. **The above Company Petition (IB) 641(MB)/2022 is allowed** and initiation of Corporate Insolvency Resolution Process (CIRP) is ordered against **M/s Shivani Flexipack Limited.**
- ii. This Bench appoints **Mr. Madan B Vaishnawa**, having Registration No: **IBBI/IPA-001/IP-P-02011/2020-2021/13052**, Address: **341/704 Kalpataru CHS Limited, Srishti Sector, 3 Mira Road (E) near Surya Shopping Centre, Thane-401107** as the Interim Resolution

Professional to carry out the functions as mentioned under the Insolvency & Bankruptcy Code, 2016.

- iii. The Financial Creditor shall deposit an amount of Rs. 5 Lakh towards the initial CIRP cost by way of a Demand Draft drawn in favour of the Interim Resolution Professional appointed herein, immediately upon communication of this Order.
- iv. That this Bench hereby directs operation of moratorium under section 14 of Insolvency and Bankruptcy Code, 2016 and prohibits the following:
 - a. the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
 - b. transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
 - c. any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

- d. the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.
- v. That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.
- vi. That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- vii. That the order of moratorium shall have effect from the date of pronouncement of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, as the case may be.
- viii. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.
- ix. During the CIRP period, the management of the corporate debtor will vest in the IRP/RP. The suspended directors and employees of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP/RP.

26. Registry shall send a copy of this order to the concerned Registrar of Companies for updating the Master Data of the Corporate Debtor.

27. The Registry is hereby directed to communicate this order to both the parties and to IRP immediately. The Registry is further directed to send a copy of this order to the Insolvency and bankruptcy Board of India for their record.

Sd/-

Sd/-

**CHARANJEET SINGH GULATI
(MEMBER TECHNICAL)**

**LAKSHMI GURUNG
(MEMBER JUDICIAL)**

Arpan, LRA